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January 31, 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

JAN 31 2000

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VIA ELECTRONIC DELIVERY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, N.W.  
Washington, D.C. 20554

Re: CC Docket No. 96-149; Ex Parte Notice Filing

Dear Ms. Salas:

In accordance with the Commission's *ex parte* rules, this letter is to notify you that representatives of the Commercial Internet eXchange Association ("CIX") met on Friday, January 28th, with Dorothy Attwood of the Office of Chairman Kennard; Jordan Goldstein of the office of Commissioner Ness; Sarah Whitesell of the Office of Commissioner Tristani and Dr. Robert Pepper of the Office of Plans and Policy; and Rebecca Baynan of Commissioner Furchtgott-Roth to discuss the above-captioned CIX and ITAA request for extension of the sunset date of safeguards governing the Bell Operating Company provision of in-region, interLATA information services.

Attending this meeting were Barbara Dooley, President, CIX; Sue Ashdown, Vice President and General Manager, xMission L.C.; Jason Oxman, Senior Government Affairs Counsel, Covad Communications Company; Jonathan Lee, Vice President, Regulatory Affairs, Competitive Telecommunications Association (Comptel); Dannie Gregory, Co-founder, Iglou Internet Services; Marc Uncapher of ITAA; Charles Griffin Government Affairs Director AT&T, John LoGalbo Associate Counsel PSINet, Karen Reed MCIWORLD.COM; and Ron Plesser and myself of Piper Marbury Rudnick & Wolfe LLP.

During these meetings, CIX members expressed the opinion that the Commission should grant the Petition and extend the structural separate affiliate requirement for BOC

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provisioning of interLATA information services on the BOCs once they obtain 271 approval. The positions discussed by CIX were those set forth in its Petition.

We expressed that a structurally separate affiliate is necessary to prevent discriminatory practices similar to the problems that ISPs have encountered with the Bell Operating Companies' intraLATA offerings. We presented the attached document that describes examples of anti-competitive conduct by BOCs against unaffiliated ISPs.

Additionally, CIX expressed its belief that Congress clearly intended for there to be a transition period by which BOCs would offer interLATA information services through a separate affiliate. Congress did not anticipate that the BOCs would have taken so long to open their markets to competition. CIX believes that Congress' intent will be realized by extending the sunset. CIX also indicated it would support a thorough inquiry into this issue with a particular emphasis on how broadband deployment may be effected.

This letter is being filed electronically in the above-captioned docket. Should you have any questions, please contact the undersigned.

Sincerely,

Stuart Ingis

SI/kap

cc: Dorothy Attwood  
Jordan Goldstein  
Sarah Whitesell  
Robert Pepper  
Rebecca Baynan

### **Examples of Anti-Competitive Conduct by BOCs Against UnAffiliated ISPs**

Because until last month no Bell Operating Company (BOC) had satisfied the 271 checklist in any state, there is no record concerning BOCs favoring their own interLATA information services. Bell Atlantic only recently received section 271 approval and is still determining the manner in which it will offer interLATA information services.

Evidence regarding BOCs' treatment of their own *intra*LATA data services raises serious questions whether BOCs are already using their bottleneck control of the local loop to favor their own DSL services. Maintaining Section 272 safeguards is of great importance in detecting discriminatory conduct. Internet services are likely to be an area particularly susceptible to discrimination because of the significant growth potential in this market. ISPs, who typically do not have the benefit of the unbundling and interconnection rights available to CLECs, are particularly vulnerable to such conduct.

Despite the clear mandates of the Act and the Commission's rules that the BOCs provision DSL-conditioned lines to both their competitors and their affiliates on a non-discriminatory basis, ISPs often experience extraordinarily slow DSL-line provisioning, resulting in an inability to serve end-users.

1. Even in New York, the only state in which a BOC satisfied 271 requirements, the Department of Justice stated that it was "unable to conclude . . . that Bell Atlantic has demonstrated an acceptable level of performance [or] that CLECs currently have access to DSL loops necessary for them to compete effectively." DOJ Evaluation of Bell Atlantic 271 at 27-28. For example, competitors presented evidence that Bell Atlantic provisioned functioning loops in a discriminatory fashion, thereby causing competitors to lose customers (with cancellation rates as high as 50%). In granting Bell Atlantic's 271 application, the FCC did not refute DOJ's statement, but instead decided that "special circumstances" merited aggregating Bell Atlantic's DSL provisioning with provisioning of traditional voice-grade lines and giving it little weight. (Bell Atlantic 271 Order at ¶¶ 328-29)

Chairman Kennard stated that he would have opposed granting the 271 application in New York, absent Bell Atlantic's offer to provide local DSL service through a separate affiliate.<sup>1</sup>

2. In Utah, US West precluded competitive providers from obtaining DSL-conditioned lines until well after US West began marketing and rolling out its own DSL Internet services. Even when US West officially made DSL-conditioned lines available to competing ISPs

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<sup>1</sup> Communications Daily, December 23, 1999, at 1.

in Utah, provisioning was extremely slow. The Public Service Commission of Utah, in response to at least complaint, is monitoring US West's activities regarding the provision of DSL-conditioned lines.<sup>2</sup>

3. In New Mexico, US West has failed to provide DSL service altogether, largely because its anti-competitive MegaBits DSL tariff has been challenged by competitors.<sup>3</sup> The slow provisioning of DSL-conditioned lines, or the outright refusal to provide such lines, will stymie competition in the provision of DSL transport services. In turn, ISPs will be unable to obtain the cost savings and service quality generally achieved in a competitive market.
4. The BOCs also have sought to impede competition by unlawfully bundling advanced telecommunications services with information services and customer premises equipment, despite the fact that the Commission "has restricted bundling of CPE and enhanced services with telecommunications services out of a concern that carriers could use such bundling in anti-competitive ways."<sup>4</sup> These "restrictions not only prevent carriers from offering distinct goods and/or services only on a bundled basis, but also prohibit carriers from offering 'package discounts,' which enable 'customers [to] purchase an array of products in a package at a lower price than the individual products could be purchased separately.'"<sup>5</sup>

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<sup>2</sup> See Complaint of Jeff L. Middleton v. Mountain States Telephone and Telegraph Company, dba U S West Communications, Inc., Docket No. 98-049-30, Report and Order (Public Service Commission of Utah, April 13, 1999).

<sup>3</sup> See Borland, John, "U S West Faces State Government Fire," <http://news.cnet.com/news/0-1004-200-121617.html> (September 20, 1999).

<sup>4</sup> See *In the Matter of Policies and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61; *1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket No. 98-183, *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 21531 (1998), ¶ 2.

<sup>5</sup> *Id.* at ¶ 1

5. Notwithstanding these restrictions, when a customer orders Bell Atlantic's Infospeed DSL service and Bell Atlantic.net Internet service in combination, Bell Atlantic charges only \$99 dollars for its DSL modem, and waives the \$99 service charge.<sup>6</sup> If the customer orders Infospeed DSL, but selects a competing ISP, Bell Atlantic imposes the \$99 service charge and charges \$325 for the DSL modem.<sup>7</sup> Bell Atlantic in this case is offering absolutely free the modem in a package at a lower price than the individual products could be sold separately (e.g., \$325 for the DSL modem if not purchased with Bell Atlantic.net). Such extreme price disparities are designed to eliminate all meaningful competition. Many BOCs also waive, or heavily discount, fees and charges for installation, activation, and modems.<sup>8</sup> Some BOCs also have reduced the cost of DSL Internet service when a customer purchases a package of other BOC-provided services.
6. BellSouth charges \$50 for its FastAccess DSL Internet service when a customer orders BellSouth's complete data services offering --but charges \$59 when the FastAccess DSL Internet service is purchased separately.<sup>9</sup>

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<sup>6</sup> See [http://www.bell-atl.com/adsl/more\\_info/pricing\\_isps.html](http://www.bell-atl.com/adsl/more_info/pricing_isps.html) (visited November 12, 1999).

<sup>7</sup> See [http://www.bell-atl.com/adsl/more\\_info/pricing\\_isps.html](http://www.bell-atl.com/adsl/more_info/pricing_isps.html) (visited November 12, 1999).

<sup>8</sup> See [http://www.uswest.com/pcat/for\\_home/product/0,1084,537\\_1\\_3,00.html](http://www.uswest.com/pcat/for_home/product/0,1084,537_1_3,00.html) (visited November 12, 1999) (US West offers a \$75 rebate on activation fees and a free modem); [http://www.bell-atl.com/adsl/more\\_info/pricing.html](http://www.bell-atl.com/adsl/more_info/pricing.html) (visited November 12, 1999) (Bell Atlantic offers free service connection and a DSL modem for \$99); <http://www.pacbell.com/products/business/fastrak/dsl/pricing.html> (visited November 12, 1999) (Pacific Bell offers free service activation and free equipment installation).

<sup>9</sup> See <http://services.bellsouth.net/external/adsl/cost.html> (visited November 12, 1999) (BellSouth Complete Choice® consists of BellSouth's local telephone service and other optional features).